of the trustees of the Association. No doubt the request was made on the instruction of Lim Eng Peng. However, the receipt was issued in the name of the Association. Lim Eng Peng himself did not wish to be the tenant.

The plaintiff also claims damages, under two heads, (1) for use and occupation of the premises from November 1, 1971, to delivery of possession at $115 p.m. and (2) General damages.

The plaintiff has not satisfied me that it was in a position to proceed with the development of the property and has not proved that it has suffered any loss which flows directly from the defendants' act in remaining in occupation of the premises.

I however award damages under the first head of claim.

There will, therefore, be judgment for the plaintiff and costs. There will be a declaration in terms of prayer (i) and an order in terms of prayers (ii) and (iii) and for damages.

Claim allowed.

Solicitors: *Oehlers & Choa; Chelliah & Co.*

MALAYSIAN REPORTS

METAL INDUSTRY EMPLOYEES UNION v. REGISTRAR OF TRADE UNIONS & ORS.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) December 22, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 80 of 1975]

Administrative Law — Application for declaration that Registrar of Trade Unions is not empowered to rule that certain workmen cannot be members of trade union — Alternative remedies — R.S.C. 1957, O.54A — Trade Unions Ordinance, 1959, ss. 2(2) and 17(4).

Industrial Law — Definition of trade union — Power of Registrar of Trade Union to rule whether certain workmen can be members of trade union — Recognition of trade union — Trade Unions Ordinance, 1959, ss. 2(2) and 17(4) — Industrial Courts Act, 1967, s. 8.

Practice and Procedure — Application for declaration — Whether properly made by originating summons — R.S.C. 1957, O.54A, r.1A.

In this case the appellants sought to represent the workmen of the Selangor Pewter Company Sdn. Bhd. The Registrar of Trade Unions ruled that the workmen of the Selangor Pewter Company Sdn. Bhd. were not engaged in an industry or trade similar to that of workmen represented by the appellants. The appellants sought by way of originating summons certain declarations including a declaration that the Registrar of Trade Unions was not empowered under section 2(2) of the Trade Unions Ordinance, 1959 to rule that the workmen of the Selangor Pewter Co. Sdn. Bhd. could not properly be members of the appellants' union. The learned judge of the High Court dismissed the application (*ante* p. 80) and the appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the learned judge was right in declining to exercise his discretion to make the declarations as the statutory remedy of appeal better suited the case and would more satisfactorily dispose of the dispute;

(2) (*per* Ong F.J.) this was not a proper case for the exercise of the discretion in favour of the appellant. The application was misconceived and the court had no jurisdiction to grant the declaration;

(3) (*per* Ong F.J.) the declaration sought in this case could in no way be said to fall within the ambit of O.54A r.1A and therefore the procedure of application by originating summons was wrong.

Cases referred to:-

(1) *Manggai* v. *Government of Sarawak & Anor.* [1970] 2 M.L.J. 41, 44 and 45.

(2) *Barraclough* v. *Brown* [1897] A.C. 616, 620.

(3) *Pasmore* v. *The Oswaldtwistle Urban District Council* [1898] A.C. 387, 394.

(4) *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721, 724.

(5) *Attorney-General of Malaysia* v. *Chemical Workers Union of Malaya* [1971] 1 M.L.J. 38, 40.

(6) *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government & Anor.* [1958] 1 All E.R. 625; [1959] 3 All E.R. 1; [1960] A.C. 260.

(7) *In re Barnato deceased* [1949] 1 Ch. 21, 27.

(8) *Guaranty Trust Company of New York* v. *Hannay & Company* [1915] 2 K.B. 536, 548-549.

(9) *Rigden* v. *Whitstable Urban District Council* [1958] 3 W.L.R. 205.

(10) *Thomas* v. *Attorney-General* [1937] 1 Ch. 72, 76.

FEDERAL COURT.

D. P. Vijandran for the appellants.

Zaleha binte Zahari (Federal Counsel) for the first and second respondents.

M. Shankar for the third respondents.

Lee Hun Hoe C.J. (Borneo) (read by **Ong Hock Sim F.J.**): This is an appeal against the refusal of Wan Suleiman F.J. to grant certain declarations by way of originating summons under Order 54A of the Rules of the Supreme Court.

Appellants sought to represent the workmen of the Selangor Pewter Company Sdn. Bhd. But, the first respondent in the exercise of his power under section 2(2) of the Trade Union Ordinance, 1959 ruled that the workmen of the Selangor Pewter Company Sdn. Bhd. were not engaged in an industry or trade similar to that of workmen represented by appellants. He gave his reasons in his affidavit affirmed on March 8, 1974. By an originating summons under O.54A appellants sought four declarations which were set out in the judgment of Wan Suleiman F.J. I need not repeat them here.

At the hearing the respondents raised a preliminary objection. The learned judge confined himself to the question whether in view of section 17 of the said Ordinance the High Court should exercise its discretion in interfering with the ruling of the first respondent. He relied on the decision of this court in *Manggai* v. *Government of Sarawak and Anor.*[1] In that case the dispute concerned certain land in Simanggang in the Second Division of Sarawak. Appellant won in the District Native Court. However, the Resident's Native Court allowed the appeal and set aside the decision of the District Native Court. Normally, an appeal would be heard by the Resident of the Division in which the subject matter in dispute arose. In view of the fact that the Resident, Second Division, had refused appellant extension of time to appeal, the Resident, Third Division was asked to hear the appeal. Instead of appealing to the Native Court of Appeal, the appellant applied to the High Court for a declaration, *inter alia*, that the Resident's Native Court was *functus officio* and without jurisdiction to hear the case by way of appeal or otherwise and that the purported judgment delivered by that court was null and void. The High Court declined to make the declaration. In dismissing his appeal this court held that there was an adequate alternative remedy available to him of an appeal to the Native Court of Appeal under the Native Courts Ordinance (Cap. 43).

Gill F.J., as he then was, delivering his judgment with which both Chief Justices agreed, made these observations:

"It is well settled law that the court will not make a declaratory judgment where an adequate alternative remedy is available (see *Halsbury's* Laws of England, 3rd edition, volume 22, page 749, paragraph 1611). To quote but a few authorities in support of that proposition, Lord Herschell said in *Barraclough* v. *Brown*:[2]

'It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that court for a declaration that on the true interpretation of the statute he had a right to recover them. It might be enough to say that no such case was made by the appellant's claim. But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover — the very matter relegated to the inferior court — determined. Such a proposition was not supported by authority, and is, I think, unsound in principle.'

In *Pasmore* v. *The Oswaldtwistle Urban District Council*[3] Earl of Halsbury L.C. said:

'... The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.'

In the more recent case of *Wilkinson* v. *Barking Corporation*[4] Asquith L.J. said:

'... It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others'."

Before us Encik Vijandran submitted that the first respondent totally misconceived his power under section 2(2) of the said Ordinance and misapplied it. Section 2(2) reads:—

"(2) For the purposes of the definition of 'trade union' in sub-section (1), and for the purposes of sections 72 and 74, 'similar' means similar in the opinion of the Registrar."

He complained that the learned judge had made no attempt to deal with the issue of nullity or with the case of *Attorney-General of Malaysia* v. *Chemical Workers Union of Malaya*.[5] In view of the approach of the learned judge to the question before him, it was not necessary for him to go into all the cases cited. As regards the issue of nullity, it is not quite true to say he did not deal with it. At pages 62 to 63 of the Appeal Record he dealt with Encik Vijandran's contention on nullity. As the learned judge considered that the first respondent was empowered to express his opinion under section 2(2) it would seem that the appellants' contention on nullity was rejected.

In the present case the question of the appropriate form of bringing the matter to court was not raised. However, Encik Shankar contended that appellants should not bypass the Minister by coming to court and that it was not the object of O.54A to confer such remedy. The court has a discretion whether to make a declaration or not as O.54A r.4 provides that:—

"The court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

In *Chemical Workers Union's case*[5] Abdul Aziz J. stated:—

"The question whether the decision of the Registrar of Trade Unions made by him under section 2(2) of the Trade Unions Ordinance, 1959 can or cannot be questioned by an Industrial Court is best answered by an examination of the section itself which reads:—

'2(2) For the purposes of the definition of 'trade union' in sub-section (1), and for the purposes of sections 72 and 74, 'similar' means in the opinion of the Registrar.'

Sub-section (1) deals with definitions including the definition of a 'trade union', section 72 deals with the formation or amalgamation of two or more trade unions into one federation of trade unions and section 74 deals with the affiliation of a trade union with the federation of trade unions. It is the duty of the Registrar of Trade Unions to register a trade union of workers employed in similar trade, occupation or industry, to approve the federation of two or more trade unions, or the affiliation of a trade union with the federation of trade unions, of similar trade, occupation or industry. For these and these purposes only could the Registrar validly exercise his powers to declare similarity of trade, occupation or industry."

Encik Vijandran submitted that section 2(2) came into play only at the inception or formation of a trade union, a federation of trade unions or affiliation of a

trade union and had no relevance or application to an established registered union's attempts to recruit new members. I would agree only if the attempt to recruit new members is confined to those in similar trade or industry. Otherwise, if Encik Vijandran's contention were to be accepted it would mean each and every union in the country could recruit new members from any trade or industry without regard to similarity, thereby creating an undesirable and dangerous situation. Someone must decide that "similarity". It is certainly not the union. That power rests with the first respondent subject to the Minister having the final word. That was what the learned judge understood section 2(2) to mean when he said at page 63 of the Appeal Record that the Registrar meant the workmen in Selangor Pewter Co. Sdn. Bhd. were not in a similar trade, occupation or industry as those in the appellant union and that the Registrar had the power under section 2(2) to express such opinion. He had clearly in mind the definition of "trade union" or "union" under section 2(1) as opposed to the meaning of "registered trade union". The relevant part of section 2(1) says that 'trade union' or 'union' means any association or combination of workmen or employers... (a) within any particular trade, occupation or industry or within any similar trades, occupations or industries;". I should point out that sections 72 and 74 refer to "registered trade union" with which we are not concerned in this case and therein lies the fallacy of appellants' contention.

Next, it was contended that a litigant not availing himself of the right of appeal provided by statute was irrelevant to the exercise of a court's discretion to grant a declaration. S. A. De Smith on Judicial Review of Administrative Action, 3rd edition, page 375 was cited, particularly the second proposition which reads:—

"(ii) If an applicant claims to be aggrieved by a decision made without jurisdiction ... the fact that he has not taken advantage of a statutory right of appeal should normally be regarded as irrelevant."

The author was dealing with *certiorari* and I shall say more on this when I deal with alternative remedies. In the present case there can be no doubt as to the power of first respondent under section 2(2).

Encik Shankar submitted whether the Registrar was right or not this court should not try to substitute its opinion for that of the Registrar. In this case he says the right of appeal provided by statute is relevant. That is more so because section 17(4) provides that "the decision of the Minister under this section shall be final and shall not be called into question in any court." Further, *Manggai's case*[1] supports his contention as the issue there, that is, nullity, is the same as in the present case. Cik Zaleha adopted the arguments of Encik Shankar. She added that section 2(2) was clear and unambiguous and that the jurisdiction of first respondent was never challenged until after he gave decision adverse to appellants. Further, she submitted that appellants should appeal to the Minister whose decision would be final and could not be challenged in court.

Zamir of The Declaratory Judgment at page 230 on Statutory Remedies observed that: —

"In cases where a specific remedy is provided by legislation it may be presumed that the Legislature even if not excluding the power of the High Court to grant declaratory relief, has intended that the prescribed remedy, and not any other, should ordinarily be pursued. Indeed, in such cases the court is generally disinclined to exercise its declaratory jurisdiction in the absence of special circumstances."

Encik Vijandran also relied on *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government and Anor.*[6] to support his contention that the existence of a statutory remedy did not exclude the declaratory jurisdiction. As stated earlier the court may sanction declaratory proceedings where another remedy is prescribed by legislation only in special circumstances, *e.g.* as in *Pyx Granite's case*[6] where the declaratory proceedings have been instituted to vindicate a common law right, not a statutory one. This was the main ground on which the House of Lords held that the existence of a statutory procedure did not exclude the declaratory jurisdiction. The House of Lords unanimously allowed the appeal and restored the decision of the High Court. It is of no assistance to us dealing with a different set of facts not involving any common law right.

On the question of alternative remedies, *Zamir* on The Declaratory Judgments at page 226 states: —

"The decision of the court may, accordingly, vary from case to case. It is suggested, however, that a general tendency can be made out. The High Court is usually inclined, unconsciously perhaps, to grant declaratory relief where the alternative remedy is one within its jurisdiction — usually it will be a non-statutory remedy — *e.g.* damages, an injunction, or a prerogative order. In such cases the court, when making a declaration, is sure not to encroach on jurisdiction assigned to another tribunal. The High Court, on the other hand, is disinclined to entertain a declaratory action where the alternative remedy is by recourse to another tribunal — this will usually be a statutory remedy — *e.g.*, an appeal to a Minister.

There are good reasons for this attitude. First, the Legislature, by conferring jurisdiction in certain matters on a specified tribunal, presumably intended this tribunal to be the ordinary forum for the adjudication of these matters. And secondly, the specified tribunal is often better qualified for dealing with the matters assigned to it."

The learned judge was clearly right in declining to exercise his discretion to make the declarations as the statutory remedy better suits the case and will more satisfactorily dispose of the dispute. The matter would have been settled one way or another if an appeal had been made to the Minister under section 17 of the said Ordinance instead of pursuing the matter in courts and incurring unnecessary costs and causing delay.

For reasons given, I would dismiss the appeal with costs here and below. Deposit to respondent against taxed costs.

Ong Hock Sim F.J.: I agree with the learned Chief Justice, Borneo that this appeal be dismissed with costs. I would add my own reasons for so doing.

The application was initiated purportedly under Order 54A of the Rules of the Supreme Court. For the purposes of this appeal the only declaration that was sought was a declaration that the Registrar of Trade Unions is not empowered under Section 2(2) of the Trade Unions Ordinance 1959 to rule that the workers of the Selangor Pewter Co. Sdn. Bhd. cannot properly be members of the Metal Industry Employees Union. Order 54A rule 1A reads:—

"Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled

to the right depends upon a question of construction of any written law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed."

The applicability of Order 54A was dealt with in *In re Barnato, Decd.*,[7] where Harman J. said: —

"I must, therefore, consider whether question 3 of the summons is one that comes within the Rules of court, for procedure by way of originating summons being a creature of statute can only be resorted to in cases provided for by the rules."

The limited scope of rules of court is also reiterated in *Guaranty Trust Company of New York* v. *Hannay & Company*.[8] There Buckley L.J., said: —

"The words of Order XXV., r.5, are: 'whether any consequential relief is or could be claimed or not.' But it is impossible, I think, to read the words of the rule as giving the court power to make a declaration where there is no cause of action. If that were its effect, this part of the rule would be *ultra vires*. If there is no cause of action there is, in my opinion, no jurisdiction. The rule is only one of procedure: *per* Lord Davey in *Barraclough* v. *Brown*.[2]

x x x

... Lord Davey so understood the rule, and in *Barraclough* v. *Brown*[2] used the following words: 'It would obviously be incompetent for the judges or the Rule Committee under a power to make rules of procedure to give the court power to deal with a matter which is outside the jurisdiction. The rule relates to procedure only, and must be so construed'."

It is apparent that construction of a statute by itself is not enough to constitute the basis for exercise of jurisdiction by the court. It can only be where the applicant is a person claiming a legal or equitable right where the determination of his entitlement to that right depends upon a question of construction of the statute in question. The declaration sought can in no way be said to fall within the ambit of rule 1A.

We were referred to a number of authorities by learned counsel for the appellant. An examination of these cases would show that they were all initiated by a writ and regulated by Order 25, not Order 54A. The nearest authority that I find applicable to the present case is *Rigden* v. *Whitstable Urban District Council*,[9] the headnote of which reads: —

"A local authority served on *R.* an enforcement notice dated September 27, 1957, under section 23 of the Town and Country Planning Act, 1947, to discontinue on or before November 7, 1957, the use of his land as a caravan site, and to restore it to agricultural land. The notice was stated to take effect on October 31, 1957.

By originating summons taken out under R.S.C., Ord.54A, *R.* claimed a declaration that the enforcement notice did not comply with the provisions of section 23, since if he appealed against the notice, the time within which he was required to restore his land would have expired before he had heard the outcome of the appeal, and that the notice was, accordingly, null and void: —

Held, that this was not a proper case for application by originating summons ,since *R.* was merely interested to show that the notice was invalid and was not a person 'interested under a written instrument' within the meaning of Ord.54A, r.1, *nor was he 'claiming any legal or equitable right'* which depended on the construction of the Act within the meaning of Ord.54A, r.1A." (The italics are mine).

In our present case, the applicant seeks to show that, on a proper construction of Section 2(2) of the Trade Unions Ordinance — a definition section — the Registrar has no power to decide on the eligibility of any particular group of workers to join the Union. That the Union is only interested in the scope and extent of the Registrar's powers can be gathered from the following paragraphs of the affidavit in support of the Originating Summons.

"5. The Union has sought and is seeking to register as its members the workers of the Company.

6. On May 2, 1973 *the Union wrote* to the Company *asking the latter to accord recognition* to the Union *as representing the workers* of the Company. (A copy of the said letter is attached as an exhibit hereto and marked 'P1').

7. On June 7, 1973, not having received a positive response from the Company *the Union referred the question of recognition to the Minister* of Labour and Manpower. (A copy of the letter is attached as an exhibit hereto and marked 'P2').

10. On June 21, 1973, the *Registrar wrote* to the Union stating *that the workers* of the Company *could not properly be registered as members* of the Union. (A copy of the said letter is attached hereto as an exhibit and marked 'P4').

11. On July 6, 1973 the *Company replied refusing recognition* on the ground that the Union was not the right Union to represent the workers of the Company. (A copy of the said letter is attached hereto and marked 'P5').

12. On July 17, 1973 the *Union* through its solicitors *wrote* to the Registrar *asking permission to register the workers.* (A copy of the said letter is attached as an exhibit hereto and marked 'P6').

13. On July 27, 1973 the *Registrar replied maintaining his earlier ruling.* (A copy of the said letter is attached hereto as an exhibit and marked 'P7')." (The italics are mine).

As Danckwerts J. said in *Rigden's* case (cit.): —

"I have come, with some reluctance, to the conclusion that the plaintiff cannot bring himself within the terms of either of those rules. It is perfectly true that he is interested in the question of the validity of the notice, and *it may be true that the question of the validity of the notice depends on the proper construction of the statute, but the jurisdiction conferred by Order 54A is very restricted, and if it does not fall within the terms of the rules, I have no power,* whatever I would like to do, *to consider the application....* Again, *with regard to rule 1A, he is not 'claiming any legal or equitable right,' which depends upon a question of the construction of the statute.* Although there might be a question depending on the true interpretation of section 12 and the exercise by the planning authority of its powers conferred by the Act, it is not, I think, a matter which can be said to be raised by the validity of a notice.... It does not seem to me that he is claiming any legal or equitable right which depends on the construction of the notice, and therefore I have most reluctantly come to the conclusion that I am not in a position to entertain this application, and it must be dismissed." (The italics are mine).

Before the High Court, the summons was dismissed because the learned judge was of opinion that the exhibits P4 and P7 constituted opinion expressed by the Registrar in accordance with Section 2(2) and a dissatisfaction with such opinion should be taken up by way of appeal to the Minister under Section 17, whose decision thereon "shall be final and shall not be called into question in any court." The challenge by appellant's counsel to the power of the Registrar to do so was in answer to the respondents' contention that the application cannot be maintained without exhausting the alternative statutory remedy under section 17 before coming to the High Court.

We are quite aware that in proper cases the court will be prepared to pronounce a declaratory judgment, and, on this point, I would quote Farwell J. in *Thomas* v. *Attorney-General*[10]: —

"That the court has power to make declaratory judgments is plain and is expressly provided by Order XXV., r.5: 'No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought

thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.' *That power given to the court to make declaratory judgments is purely discretionary, and the court is not bound to entertain such an application except in a proper case.*" (The italics are mine).

The respondents urged the court to dismiss the application on the ground that it was not a proper case for the exercise of discretion in favour of the appellant. We were referred to Order 54A, rule 4 which reads:—

"The court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

The High Court did not deal with this aspect but in view of the negative character of the declaration sought I am disposed to agree with the objection to granting the declaration sought in the summons.

One other point which is significant is the letter of the appellant union to the third respondent, paragraph 1 of which reads:—

"We wish to inform you that *majority of the employees* in M/s. Selangor Pewter Co. Sdn. Bhd. *are members of our Union* and *we are submitting this claim for recognition in accordance with the provisions of Section 8 of the Industrial Relations Act 1967.*" (The italics are mine).

and, in paragraph 8 of the affidavit, it is admitted that the *question of recognition* would only *be decided after it was determined whether the union was entitled to represent the workers.* Section 8 of the Industrial Relations Acts clearly provides the machinery for dealing with this question of recognition. It was for the Minister to decide the question and "any decision made by him" thereon "shall be final and shall not be questioned in any court." I reproduce the relevant sections to remove any doubt on this point:—

"8. (2) A trade union of workmen may serve on an employer or on a trade union of employers in writing a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within thirty days after the service of such claim either accord recognition or, if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds therefore.

(4) Upon receipt of a notification under subsection (3) or where an employer or a trade union of employers has failed to comply with the provisions of subsection (3), the trade union of workmen may report the matter in writing to the Minister.

(5) The Minister, upon receipt of a report under subsection (4) may take such steps as may be necessary or expedient to resolve the matter and shall, if the matter is not resolved, give a decision; and the Minister's decision as to who shall be workmen in managerial or executive positions or employed in confidential capacity or engaged in security work made under subsection (1) of this section and any decision made by him under this section shall be final and shall not be questioned in any court."

The appellant desired a declaration that the Registrar of Trade Unions is not empowered under Section 12(2) of the Trade Unions Ordinance 1959 to rule that the workers of the Selangor Pewter Co. Sdn. Bhd. cannot properly be members of the Metal Industry Employees Union. One perhaps wonders then why the appellant Union should, through its solicitors, request permission of the Registrar to register the workers(see paragraph 12 of the affidavit of its President sworn on September 20, 1973).

Here also, the court did not say that the real issue was essentially one of recognition and Section 8 was mentioned by Senior Federal Counsel in arguments before the Court. Having regard to the provisions of Section 6 of the Trade Unions Ordinance, 1959 and to Section 8 of the Industrial Relations Act, 1967, I am of opinion the application is misconceived and the court has no jurisdiction to grant the declaration.

It would also not be out of place to point out that the terms of the declaration sought, namely, that the "Registrar of Trade Unions is not empowered under Section 2(2) of the Trade Unions Ordinance, 1959...." is *ex facie* wholly irreconcilable with paragraph 12 of the affidavit of the President of the Union sworn to on September 20, 1973, in support of the motion which has been referred to earlier in the judgment to the effect that the majority of the employees are already members.

I am therefore of the view that this appeal is without merit and the appeal is dismissed with costs.

Suffian L.P. concurred.

Appeal dismissed.

Solicitors: *D. P. Vijandran & Zulkifli, Shearn Delamore & Co.*

KRISHNA SREEDHARA PANICKA v. CHIAM SOH YONG REALTY COMPANY LTD.

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) December 23, 1975]

[Johore Bahru — Federal Court Civil Appeal No. 21 of 1975]

Landlord and Tenant — Application for recovery of premises — Whether controlled premises — Premises built before January 31, 1948 — Premises demolished and rebuilt — Substantial or fundamental alteration — Whether new building created — Burden of proof — Control of Rent Act, 1966, s. 4(2).

Evidence — Burden of proof — Burden of proof that premises were not controlled premises.

The respondents had obtained vacant possession of the premises, which were built before January 31, 1948 and thereafter had demolished it except for the party wall and the rear wall, and rebuilt it. The appellant subsequently became the tenant of the first floor of the premises. The respondents served a notice to quit on the appellant and on his failure to comply, they commenced an action for possession. The learned President of the Sessions Court held that the onus of proof that the premises were controlled premises was on the appellant. After hearing evidence he held that the alterations to the premises were so substantial that they had the effect of fundamentally changing the identity and character of the building and he entered judgment against the appellant for the respondents as prayed. The appellant appealed to the High Court, which dismissed the appeal. The appellant then appealed to the Federal Court.

Held (Gill C.J. and Raja Azlan Shah F.J., Ali F.J. dissenting) dismissing the appeal: the only true conclusion to be derived from the facts was that after the demolition of the old building and the rebuilding, a new building came into existence and therefore the learned judge in the High Court was right in dismissing the appeal.

Cases referred to:-

(1) *Mohamed Myddin* v. *Teo Mek Yok* [1966] 2 M.L.J. 284.

(2) *Leong Yoong* v. *Lee Sem Yoong* [1968] 2 M.L.J. 72.